United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 75-4242

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

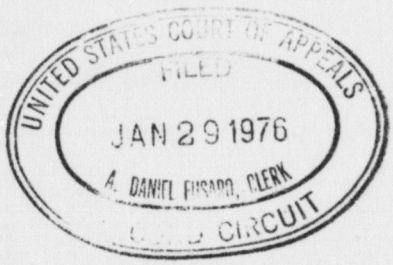
v.

GENERAL IRON CORP.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF AND SUPPLEMENTAL APPENDIX FOR THE NATIONAL LABOR RELATIONS BOARD



PAUL J. SPIELBERG,
JAMES HIRSCHHORN,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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INDEX

AUTHORITIES CITED

Cases:

Page

Page

Statute:

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUES PRESENTED

I. Whether substantial evidence in the record as a whole supports the Board's finding that the Company threatened, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.

II. Whether substantial evidence on the record as a whole supports the Board's findings and conclusions that the Company laid off employees Bailey, Carrion, Escalera, Gonzales, Pellott Reyes and Sanchez Agosto, and discharged employees Pieretti and Vilcius, in violation of Sections 8(a)(3) and (1) of the Act.

III. Whether the conflict between the interests of the employees and Local 840, International Brotherhood of Teamsters made it inappropriate for the Board to defer to arbitration of the layoffs and discharges.

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order against General Iron Corp. The Board's Decision and Order (A. 45),[1] issued on June 23, 1975, is reported at 218, NLRB No. 109. This Court has jurisdiction, the unfair labor practices having occurred in Brooklyn, New York.

I. THE BOARD'S FINDINGS OF FACTS

Briefly, the Board found that the Company threatened and coerced its employees in violation of Section 8(a)(1) of the Act, and that it laid off employees Charles Bailey, Jose Carrion, Luis Escalera, Carlos Gonzales, Enrique Pellott Reyes, and Manuel Sanchez Agosto, and discharged employees Jose Pieretti and Marcellas Vilcius, all in violation of Section 8(a)(3) and (1) of the Act. The evidence supporting the Board's findings is as follows.

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[1] "A" references are to the printed appendix. "SA" references are to the supplemental appendix included in Board's brief. References preceding a semicolon are to the Board's findings and conclusions; those following are to the supporting evidence.

A. Background

General Iron Corporation (the "Company") fabricates and sells miscellaneous metal products (A. 5; 182-83, 193). At the time of the unfair labor practices, the Company employed approximately 20-25 production and maintenance workers at its plant in Brooklyn, New York. (A. 6; 109).

The Company's principal officers are Henry Accarino, President, and Mario Accarino, Secretary-Treasurer (A. 76). Henry Accarino is in charge of production. He spends approximately 90 percent of his time on the factory floor setting up machinery, talking to the employees, and generally observing and supervising operations. (A. 22; 180, 204-05.) Although Mario Accarino is primarily concerned with office work, he also spends some time on the factory floor (A. 22; 169, 175).

B. Local 455 Attempts to Organize the Employees

In 1971, the Company recognized Local 840, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers (hereafter "the Teamsters") as the representative of its production and maintenance employees and signed a contract which expired on August 22, 1974 (A. 64).[2] In the spring of 1974, some of the employees became interested in representation by another union (A. 6; 101). In early May, Leroy Howard, a Teamster shop steward, obtained authorization cards from Shopmen's Local 455, International Association of Bridge, Structural, and Ornamental Iron Workers ("the Iron Workers"). Howard distributed cards

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[2] All dates are 1974 unless otherwise indicated.

in the plant during break time (A. 6; 102). Jose Pieretti, a welder, also distributed Iron Workers' cards to the Spanish-speaking employees (A. 6; 123-24). On May 23, Local 455 sent a telegram to the Company in which it claimed to represent a majority of the employees and requested a meeting (A. 6; 62). Henry Accarino received the telegram on May 24 (A. 6).

Thereafter, the Teamsters business agent, William Nuchow, called Howard to ask why he had passed out Iron Workers cards (A. 8; 103). The next morning, the Tuesday after Memorial Day, Nuchow came to the plant and reproached Howard for bringing in another union. He then called a meeting of the employees and asked for another chance to get a contract. (A. 8; 105, 136.) That afternoon Nuchow returned to the plant and assembled the employees on the factory floor. He then called for a show of hands between Teamster's and Iron Workers supporters, which the Iron Workers won 11-10 (A. 8; 105, 136).[3] Mario Accarino was on the factory floor, in the shipping department, during this poll. (A. 22; 108).

C. The Accarinos Threaten Employees with various reprisals to discourage their interest in the Iron Workers

1. Leroy Howard

Some time after Memorial Day, Henry Accarino approached Leroy Howard at his work bench and told him to "leave the union alone, get

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[3] In a later conversation with Howard, Nuchow threatened the Company's employees with bodily harm if they got involved with Local 455. (A. 8; SA 7). The Board found this to be a violation of Section 8(b)(1)(A) of the Act (A. 46). The Teamsters are complying with the Board's cease and desist order.

out of the union" and stop trying to persuade the men to join Local 455. Accarino added that he would close the plant before he would sign a contract with the Iron Workers, that he could not pay what they would ask, and that "that union will rob me." (A. 12; 107, 119-20.)

2. Jose Pieretti

A day or two after the Memorial Day holiday, Henry Accarino called Jose Pieretti over to him in the factory and spoke with him alone. When Accarino asked whether the employees wanted a new union, Pieretti replied that they did. Accarino then told Pieretti that he wanted no union problems and that "the union we have here have to stay here." He also warned that he could "fire everybody out." (A. 14; 131.)

On a working day in June, Pieretti requested and received a day off from Henry and Mario Accarino to take care of personal business. He then met a representative of Local 455 a block away from the factory and was driven to the Board's regional office, where he gave a statement to a Board agent. Pieretti had not told either Accarino he was going to the Board. The next morning, Mario Accarino approached Pieretti and said "the next time you are going to ask me for a day off I [am] going to fire you because I know where you was. . . ." (A. 16; 137-38.)

D. The Company Discriminatorily Lays Off Six Employees

Employees Charles Bailey, Jose Carrion, Luis Escalera, Carlos Gonzales, Enrique Pellott Reyes, and Manual Sanchez Agosto signed Iron Workers authorization cards in early May (A. 20; 57-60, 102, 126-30). As stated above, Local 455 requested recognition on Thursday, May 23. The following Tuesday, May 28, Nuchow conducted his show of hands.

That day Escalera and Gonzales were laid off. Carrion, Pellott Reyes, and Sanchez Agosto were laid off on May 29, and Bailey was laid off on May 30. (A. 6 n. 4; 78-81.) Although the Company claimed that the layoffs followed seniority, employee Frank Jesus, who was junior to four of the discriminatees, was not laid off (A. 24; 63, 188, 220.)[4] On May 30, the Company mailed Escalera, Gonzales, and Sanchez Agosto notices to return to work June 3. On June 4, it mailed notices to report on June 6 to Bailey, Carrion, and Pellott Reyes. (A. 23-24; 188-89, S.A. 1-6.)[5] None of the men returned to work.[6]

E. The Company Discharges Jose Pieretti

Jose Pieretti was discharged by the Company on July 29. He had been employed since 1971 in a variety of jobs, primarily as a spot welder. (A. 28; 122.) Pieretti was an active partisan of Local 455; he had distributed authorization cards to the Spanish-speaking employees; he spoke against the Teamsters at one of Nuchow's meetings on May 28, and he voted against the Teamsters in the show of hands (A. 19; 125-30, 136).

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[4] Bailey was hired on May 17, Carrion on May 19, Escalera on May 9, Gonzales on April 22, Pellott Reyes on May 9, and Sanchez Agosto on May 2 (A. 68-71). Jesus was hired on May 13 (A. 63).

[5] The notices to return were in English and were sent by ordinary mail with proof of mailing but not of receipt (A. 37-38, 190). The Board deferred until the compliance stage the question whether the notices were sufficient to toll the Company's backpay liability (A. 48).

[6] Carrion was rehired on August 13 and was fired September 20. (A. 36; S.A. 8).

Until May 28, there had been no complaints about Pieretti's work (A. 28; 132). That day Henry Accarino assigned him to a spot welding machine to make a piece of work he had never done before.[7] Accarino did not instruct Pieretti how to do the work. After one-half hour, Accarino returned and criticized Pieretti for not doing the job properly. When Pieretti explained that Accarino had to show him how, Accarino said, "you know how," and walked off. However, Accarino stayed nearby, and when Pieretti asked the operator of the neighboring machine for advice, Accarino told him not to ask anyone for help. The next afternoon, Accarino shifted Pieretti to another job. (A. 28-29; 132-34.)[8]

A day or two after this incident, Henry Accarino called Pieretti into his office after work and asked what was wrong with him. When Pieretti said nothing was wrong, Accarino asked him whether he liked his work or needed money. He then asked if Pieretti would request a layoff, explaining that the Company could not lay him off on its own without "problems with the unions." Pieretti said he did not want a layoff. (A. 29; 134-36, 149-50.)[9]

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[7] For each welding job, Henry Accarino or his welding foreman would make a jig to hold the parts in place and pre-set the welding machine for temperature and pressure. The operators had to place the parts in the jig and press the operating pedal. (A. 192-93). Pieretti was unfamiliar with the jig used for the job in question (A. 132).

[8] It was common practice to switch employees from one machine to another as production runs were finished (A. 224).

[9] The Board also found this conversation to be an implied threat of discharge. (A. 15).

Pieretti had no further difficulties with his job until July 22. On that date he asked Henry Accarino for two days off to attend a Jehovah's Witnesses convention, and Accarino agreed. Pieretti was absent Thursday and Friday, July 25 and 26. When he reported for work on Monday, July 29, Henry Accarino immediately fired him for taking two days off after asking only one. Pieretti protested that he had asked for two days, as he had in previous years. (A. 29; 138-40).[10] Pieretti's record of absences and lateness was better than that of some other employees who were not discharged (A. 222-23).

As Pieretti left the factory he encountered Nuchow, who said that he knew Pieretti was laid off and that they should return to the office and discuss it with Accarino (A. 29; 140-41). In the office Nuchow asked Accarino why Pieretti was discharged, and Accarino told him it was because Pieretti made too many mistakes (A. 29; 141, 211). Pieretti denied this and accused Accarino of changing his reasons (A. 29; 141). The confrontation ended without Pieretti's reinstatement.

F. The Company Discharges Marcellas Vilcius

Marcellas Vilcius is a French-speaking Haitian who speaks and understands little English.[11] He was personally hired by Henry Accarino on September 22, 1973, on referral from an employment agency. (A. 25; 82, 205-06.) Although none of the Company's employees spoke French, Vilcius' work as a machine operator was so unskilled that Henry Accarino or a foreman could adequately instruct him by demonstration and gestures

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[10] See note 20, p. 19, *infra.*

[11] At the unfair labor practice hearing he testified through an interpreter (A. 81-82).

(A. 25; 83-84, 90-91, 182-84). Vilcius got no complaints about his work before his discharge, and he received two raises (A. 25-26; 83-84). He signed an Iron Workers card on May 10 (A. 20; 57).

On June 5, Vilcius was operating a machine that flattened the ends of "U" shaped handles. Henry Accarino had instructed him to drop the finished handles in barrels and wheel the full barrels over to the shipping department. Vilcius took five barrels, containing approximately 5,000 handles, to the shipping department, where another employee was supposed to count and pack the handles into boxes of 250. However, Vilcius had misunderstood his instructions, and he filled the smaller boxes at random, ruining the count. When Henry Accarino discovered the mistake, he had the boxes repacked and immediately discharged Vilcius. (A. 26; 93-94, 185-86.)

According to Henry Accarino, this incident brought his language problem with Vilcius to a head and made him afraid that the man could cause a more serious accident. Otherwise, he said, Vilcius was a satisfactory worker. (A. 187.) Accarino conceded, however, that Vilcius understood English as well or better at his discharge than when he was hired, and that during the nine months he worked at General Iron, Vilcius had made no more than the minor mistakes Accarino expected from any employee and had not caused any damage (A. 28; 219).

G. The Arbitration.

The collective bargaining agreement in effect between the Company and the Teamsters until August 22, 1974, provided for arbitration of grievances (A. 64-65). On September 5 and 27, a hearing was held before Arbitrator Joseph F. Wildebush with respect to the discharges and all layoffs except that of Jose Carrion. The arbitrator's award and opinion of

October 26 found that Pieretti was dismissed for just cause and that the layoffs occurred during each employee's probationary period, as permitted by the contract (A. 17; 68, 71-73.) The award also stated that Vilcius had been reinstated without backpay at the hearing (A. 18; 73).

None of the employees had filed grievances or requested arbitration; the proceedings were initiated by Nuchow (A. 17; 210, 212). At the initial hearing in September 5, none of the employees appeared. While Nuchow had notices of the second hearing mailed to the employees on September 24, he did not know whether any had received them (A. 18; 216).[12] Pieretti knew of the arbitration but refused to attend (A. 18; 158). While Vilcius was present on September 27, there was no interpreter. Nuchow did not remember if he took part in the proceedings (A. 18-19; 216, 218). Nuchow presented no evidence and called no witnesses at the hearing (A. 18; 23, 217-18).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the above testimony, the Board declined to defer to the findings and conclusions of the arbitrator (A. 19). The Board found that the Company had violated Section 8(a)(1) of the Act by Henry Accarino's statements to employee Howard that he should leave Local 455 alone and should stop influencing the employees to vote for it, and that Accarino would close down the plant before he would give Local 455 a contract; by Henry Accarino's statements to employee Pieretti that he (Accarino) didn't want any problems with unions, and that he (Accarino) could fire everyone; by Henry Accarino's subsequent suggestion that Pieretti should resign, accompanied by a reference to "the unions"; and by Mario

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[12] In fact, the letters to Gonzales, Bailey, Escalera, and Pellott Reyes were returned undelivered (A. 18; 218).

Accarino's statements to Pieretti threatening him with discharge for cooperating with the Board and indicating that Pieretti's union activities were under surveillance. The Board further found that the Company discharged employees Pieretti and Vilcius, and laid off employees Bailey, Carrion, Escalera, Gonzales, Pellott Reyes, and Sanchez Agosto, because of their support for Local 455 – all in violation of Section 8(a)(3) and (1) of the Act. The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing the employees in the exercise of their Section 7 rights. (A. 39, 49-50.)

Affirmatively, the Board's order requires the Company to offer reinstatement to Pieretti, Bailey. Escalera, Gonzales, Pellott Reyes, and Sanchez Agosto. It further requires the Company to provide backpay to the above employees and to Carrion and Vilcius.[13] Finally, the Company is required to post appropriate notices (A. 50-51).

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[13] As noted, there will be a further proceeding, if necessary, to determine the precise reinstatement and backpay rights of Bailey, Escalera, Gonzalez, Pellott Reyes and Sanchez Agosto. Carrion and Vilcius are excluded from the reinstatement provision because the former was rehired, then discharged for cause, while the latter failed to accept a *bona fide* offer of reinstatement tendered on September 27.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY THREATENED, RESTRAINED AND COERCED ITS EMPLOYEES, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

As shown in the Statement, the credited evidence in this case is that during the Iron Workers' organizing campaign the Company threatened and coerced the Iron Workers' two most important supporters. Thus, after Local 455 had requested recognition, Henry Accarino flatly told Leroy Howard to stop trying to persuade the other employees to join the Iron Workers, and to "leave the union alone." He also threatened to close the plant before he would sign a contract with the Iron Workers. At approximately the same time, Henry Accarino told Jose Pieretti that "the union we have here have to stay here." He put teeth into this preference by adding that he could "fire everybody out" if necessary.[14]

Clearly these blunt attempts to dictate the employees' choice of a union, backed by threats of discharge, plant closure, and refusal to sign a contract, violate Section 8(a)(1) of the Act. *N.L.R.B. v. Gissel Packing Corp.*, 395 U.S. 575, 618-19 (1969); *N.L.R.B. v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933, 937 (C.A. 2, 1970); *N.L.R.B. v. Patent Trader, Inc.*, 415 F.2d 190 (C.A. 2, 1969); 159 *Majestic Molded Products v. N.L.R.B.*, 330 F.2d 603, 605 (C.A. 2, 1964); *N.L.R.B. v. Fitzgerald Mills Corp.*, 313

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[14] Henry Accarino denied making the remarks attributed to him by Howard and generally denied threatening any employee (A. 12-13; 202-03). However, the Administrative Law Judge credited Howard, who is still employed by the Company and has been promoted, and also credited Pieretti (A. 12-13; 111-112). It is well recognized that credibility determinations are for the trier of fact, and should not be upset absent extraordinary circumstances not present here. *N.L.R.B. v. A&S Electronic Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833; *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965).

F.2d 260, 269 (C.A. 2, 1963), cert. denied, 375 U.S. 834. Henry Accarino's prediction that he could not afford a contract with the Iron Workers, who he thought would "rob" him, was utterly unsupported by objective facts. See *N.L.R.B. v. Gissel Packing Co., supra.*

Henry Accarino's attempt on May 28 or 29 to get Pieretti to take a layoff contained another implicit threat of discharge for union activity. That conversation occurred a few days after Accarino had threatened to "fire everybody" who persisted in working for the Iron Workers. Furthermore, Accarino had just demonstrated his power to create difficulties for Pieretti by putting him on a strange machine, criticizing his performance, and refusing to let him get help from another employee. (See p. 7, *infra*). The entire episode showed Pieretti that he was vulnerable to Accarino's pressure. In the context of Accarino's earlier conduct, urging Pieretti to ask for a layoff was manifestly a thinly veiled threat. See *Snyder Tank Corp. v. N.L.R.B.*, 428 F.2d 1348, 1349 (C.A. 2, 1970), cert. denied, 400 U.S. 1021; cf. *N.L.R.B. v. Gissel Packing Co., supra,* 395 U.S. 575, 619-20 (1969).

Finally, Mario Accarino's threat to fire Pieretti next time he asked for a day off "because I know where you was" obviously created the impression, in violation of Section 8(a)(1), that Pieretti's contact with the Board and Local 455 on the preceding day had been observed. *N.L.R.B. v. Rubin,* 424 F.2d 748 (C.A. 2, 1970); *N.L.R.B. v. United Mineral & Chemical Corp.*, 391 F.2d 829, 835 (C.A. 2, 1968).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY LAID OFF EMPLOYEES BAILEY, CARRION, ESCALERA, GONZALES, PELLOTT REYES, AND SANCHEZ AGOSTO, AND DISCHARGED EMPLOYEES PIERETTI AND VILCIUS, IN VIOLATION OF SECTION 8(a)(3) OF THE ACT.

A. The Layoffs

It is well settled that laying off employees because of their union sympathies violates Section 8(a)(3) and (1) of the Act. *N.L.R.B. v. V & H Industries*, 433 F.2d 9, 10 (C.A. 2, 1970); *N.L.R.B. v. Diamond Standard Fuel Co.*, 437 F.2d 1163 (C.A. 1, 1971); *N.L.R.B. v. Rubin*, 424 F. 2d 748, 750-51 (C.A. 2, 1970). The Board found that the Company laid off employees Bailey, Carrion, Escalera, Gonzales, Pellott Reyes, and Sanchez Agosto because of their activity on behalf of Local 455 and for the purpose of chilling that activity (A. 25).

In finding that the layoffs violated Section 8(a)(3) of the Act, the Board properly considered the Company's anti-union animus, as expressed in contemporaneous threats and commands to Howard and Pieretti. *N.L.R.B. v. Rubin, supra* at 750; *N.L.R.B. v. Revere Metal Art Co.*, 287 F.2d 632, 633 (C.A. 2, 1961). In addition, the "stunningly obvious" timing of the layoffs demonstrates an anti-Iron Workers' motive. *N.L.R.B. v. Rubin, supra.* Local 455 claimed to represent a majority of the employees on Thursday, May 23 (A. 62, 169). On Tuesday, May 28, the first work day after Memorial Day, the employees voted 11-10 for the Iron Workers in a show of hands requested by Nuchow, the incumbent Teamster's business agent. Mario Accarino was on the factory floor when the poll was held (A. 108). Escalera and Gonzales were laid off that day, Carrion, Pellott Reyes and Sanchez Agosto the next, and Bailey on May 30.

The Company contends that Henry and Mario Accarino had no idea which of their employees supported the Iron Workers and, indeed, that they hardly discussed the matter (A. 170-71, 200, 224-25). There is, however, substantial circumstantial evidence to the contrary. The Company had no more than 25 production and maintenance workers. Both Howard and Pieretti distributed cards on the factory floor during May, and neither took any pains to conceal this activity (A. 102-03, 124, 126). Henry Accarino spent approximately 90 percent of his time on the shop floor among the employees, and Mario Accarino was also in the shop on occasion (A. 175, 180, 204-05). Finally, on the day of the first layoffs, the employees' union preference was polled in an open show of hands conducted by the Teamsters' business agent at a time when Mario Accarino was in sight[15] (A. 105, 108, 136). Clearly, the Accarino's had ample opportunity to learn who supported Local 455. See *N.L.R.B. v. Dorn's Transportation Co.*, 405 F.2d 705, 713 (C.A. 2, 1969); *N.L.R.B. v. Pembeck Oil Corp.*, 404 F.2d 105, 110 (C.A. 2, 1968); *N.L.R.B. v. Joseph Antell, Inc.*, 358 F.2d 880 (C.A. 1, 1966).

Furthermore, the Company's actions compel a finding of unlawful purpose even if it is assumed that it lacked precise knowledge of which employees belonged to the Iron Workers. As this Court has stated, "a power display in the form of a mass layoff, where it is demonstrated that a significant motive and a desired effect were to 'discourage membership in any labor organization' satisfies the requirements of § 8(a)(3) to

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[15] Nuchow had held so many meetings inside the plant during April and May that Henry Accarino complained he was interfering with production and threatened to call the police (A. 110).

the letter, even if some white sheep suffer with the black." *Majestic Molded Products v. N.L.R.B.*, 330 F.2d 603, 606 (C.A. 2, 1964). Here, six men, approximately one fourth of the production workers, were laid off within days of Local 455's telegram claiming a majority and demanding recognition. This large layoff in a small plant was dramatic evidence of the Company's power and resolve to resist the Iron Workers' demands, *N.L.R.B. v. Piezo Mfg. Corp.*, 290 F.2d 455, 456 (C.A. 2, 1961); see *N.L.R.B. v. M.H. Brown Co.*, 441 F.2d 839, 843 (C.A. 2, 1971).[16]

The Company also argues that the men were laid off because of lack of work. According to Mario Accarino, the Company had developed a new product line that required expansion of the workforce in May and June. On May 20, however, a letter from a sales representative advised him that shipment of the new line should be delayed until further notice (A. 67).[17] Mario Accarino testified that he and Henry therefore decided to cut production temporarily and lay off the new employees by seniority (A. 173-74). When production was resumed, he continued, the men were recalled (A. 174).

The only evidence of lack of work, however, was these bare assertions. The letter of May 20 postponed but did not cancel the shipment of the new line, so that the goods still had to be produced (A. 177-78).[18]

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[16] Obviously, the Company could accomplish this intimidation without discharging all Iron Workers' adherents. In the light of its clear anti-Iron Workers' animus, the fact that some Local 455 adherents were not laid off does not demonstrate non-discriminatory motive. See *N.L.R.B. v. Challenge-Cook Brothers of Ohio, Inc.*, 374 F.2d 147, 152 (C.A. 6, 1967); *Nachman Corp. v. N.L.R.B.*, 337 F.2d 421, 424 (C.A. 7, 1964).

[17] This confirmed earlier discussions between the two (A. 179).

[18] New employees were hired in June and July for this purpose (A. 178).

Since no shipping date had been set before May 20, and no production records were maintained, there is no evidence that production was ahead of schedule (A. 177). Moreover, although Mario Accarino testified that the six men used the same skills as the other production workers, he could not remember if there was work available on other products (A. 177).

The timing of both the layoffs and recalls is also inconsistent with a lack of work. The Company knew of the delay in shipment on or before May 20, yet the first two men were not laid off until May 28. Furthermore, the same day as the last layoff, May 30, Escalera and Gonzales were mailed instructions to return to work on June 3. On June 4 the remaining four men were mailed instructions to report on June 6. Neither Mario nor Henry Accarino explained the rapidity of the turnaround, other than to say that work "picked up."[19]

The Board was clearly entitled to reject the Company's vague, undocumented explanations of lack of work in light of the timing of the layoffs and recalls, and the subsequent hiring of replacements (A. 24). Cf. *N.L.R.B. v. M.H. Brown Co., supra,* 441 F.2d 839, 843 (C.A. 2, 1971). And it was entitled to conclude, instead, that this layoff of six supporters of Local 455, taking place shortly after the Iron Workers had claimed a majority and immediately after an open show of hands in the plant had confirmed that claim, was meant to demonstrate the Company's resolve to resist that union. See *N.L.R.B. v. Rubin, supra,* 424 F.2d 749, 750-51 (C.A. 2, 1970); *Majestic Molded Products v. N.L.R.B., supra,* 330 F.2d 603, 605-606 (C.A. 2, 1964).

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[19] Henry Accarino did testify that "things happen in business, like I might have been waiting for steel at that time, there might have been a steel strike. Steel might have come in and I had steel for the people to work with" (A. 221). As there had been no claim that a shortage of materials had caused the layoff, this explanation was utterly unresponsive.

B. The Discharge of Jose Pieretti

As the Statement shows, Jose Pieretti was discharged on July 29. The Company contends that Pieretti was discharged because he had taken two days off to attend a religious convention although Henry Accarino had only allowed him one, and also because he had made "too many mistakes." As we show, the Board reasonably concluded that these reasons were pretexts, and that Pieretti was discharged because of his activities on behalf of Local 455.

It is a familiar principle that a discharge motivated in any part by an employee's union activity violates Section 8(a)(3) of the Act even though the employer could have discharged him for legitimate reasons. *N.L.R.B. v. Advanced Business Forms,* 474 F.2d 457, 464 (C.A. 2, 1973); *N.L.R.B. v. Dorn's Transportation Co., supra,* 405 F.2d 706 (C.A. 2, 1969); *N.L.R.B. v. Milco, Inc., supra,* 388 F.2d 133 (C.A. 2, 1968). Thus, the issue is not whether there were legitimate grounds for discharging Pieretti, but whether the record as a whole contains substantial evidence that the Company did so because of his connection with the Iron Workers. This the Board may establish through circumstantial evidence. *N.L.R.B. v. Link-Belt Co.,* 311 U.S. 584, 602 (1941); *N.L.R.B. v. Revere Metal Art Co.,* 287 F.2d 632, 633 (C.A. 2, 1961); *Hartsell Mills v. N.L.R.B,,* 111 F. 2d 291, 293 (C.A. 4, 1940). The circumstances surrounding Pieretti's discharge make it clear that the real reason for it was his support of Local 455.

Initially, the evidence discussed above (p. 15) indicates Company knowledge that Pieretti was one of Local 455's supporters. Furthermore, Pieretti, in addition to signing an Iron Workers card, had distributed them to "all the Spanish people." (A. 124). On May 28, Henry Accarino approached Pieretti and asked him what all the employees

felt about the incumbent union. Pieretti forthrightly told him that "everybody" thought a new union was needed. (A. 131.) That same day, Pieretti spoke against the Teamsters at one of Nuchow's meetings, and voted for Local 455 in the poll. Thus, Pieretti was a conspicuous supporter of the Iron Workers, and the Company had good reason to believe that his intimidation or absence would harm their campaign. See *N.L.R.B. v. Dorn's Transportation Corp.*, 405 F.2d 706, 712 (C.A. 2, 1969).

The Company, however, found it difficult to intimidate him. Despite Henry Accarino's threats and his invitation to take a layoff, Pieretti gave a statement to the Board on behalf of Local 455. From Mario Accarino's comment the next day, it is apparent that the employer knew where he had been and was displeased. Discharge was the remaining alternative.

The reasons given by the Company for Pieretti's discharge, far from refuting discriminatory intent, confirm it. The immediate occasion of the discharge was Pieretti's absence on July 25 and 26 to attend a Jehovah's Witnesses' convention. Pieretti testified that on Monday, July 22, he had been given permission by both Henry and Mario Accarino to take both days off (A. 138).[20] As soon as he arrived at work on July 29, Henry Accarino accused him of taking two days off when he had been allowed to take only one, fired him on the spot, and handed him his final paycheck (A. 140). Accarino conceded at the hearing, however, that Pieretti

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[20] Pieretti also testified that he had been given two days off for the convention in the preceding years he worked for the Company, and that the convention was always in July (A. 154-55). While the Company's records do not show any two-day absences in July 1973, they do show that Pieretti took two days off at the end of July 1972, and again in June 1973 (A. 158). It is probable that Pieretti could not remember the exact dates at the hearing, which was held in 1975.

While Henry Accarino testified that Pieretti had not asked him for permission and had gotten only one day off from Mario, the Administrative Law Judge credited Pieretti (A. 33; 200). Questions of credibility are to be resolved by the Administrative Law Judge. *N.L.R.B. v. A & S Die Co.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

was generally punctual, and that other employees who had not been fired were less so (A. 222-23).

Moreover, Henry Accarino shifted his explanation immediately after the discharge. As Pieretti left the factory he met Nuchow and at the latter's urging returned with him to Accarino's office. There Accarino told Nuchow that Pieretti was fired for making too many mistakes, and that he had given Accarino "too many headaches." (A. 140-41).

Except for one instance, however, Henry Accarino could not point out specific instances of Pieretti's mistakes.[21] That incident occurred between May 28 and 30, when Pieretti was assigned to a machine on which he had not previously worked. Although their explanations differ, both Pieretti and Henry Accarino agreed that Pieretti had difficulty operating the machine (A. 133, 148-49, 196-97). His problems were in no way lessened by Henry Accarino, who watched him closely, criticized his work, refused to instruct him, and forbade him to seek help from other employees who were more familiar with the machine (A. 132-34). Nor were they helped when Accarino summoned him to the office and urged him to take a layoff (A. 134-36). See p. 13, *supra*. After two days on the new machine Pieretti was transferred elsewhere, and no more was heard of the incident until the hearing. He received no subsequent complaints, reprimands, or warnings (A. 134).

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[21] Pieretti testified without contradiction that he had not received any complaints or warnings about mistakes except for the same incident (A. 132, 141). He had been with the Company since 1971 (A. 32; 83). The Administrative Law Judge noted that the Company did not call Pieretti's foreman, who was present, to confirm Accarino's version of Pieretti performance (A. 32; 83). See *N.L.R.B. v. Dorn's Transportation Co., supra*, 405 F.2d 706, 710 (C.A. 2, 1969); cf. *N.L.R.B. v. Ford Radio & Mica Co.*, 253 F.2d 457, 463 (C.A. 2, 1958).

In sum, it is apparent that Pieretti was an experienced and competent employee who had no trouble at work until his efforts on behalf of Local 455 came to the Company's attention. See *N.L.R.B. v. Great Eastern Color Lithographic Corp.*, 309 F.2d 352, 354 (C.A. 2, 1962), cert. denied, 373 U.S. 950. He was fired without warning, allegedly for an extra day off, although other employees with more serious absenteeism were not discharged. See *N.L.R.B. v. Dorn's Transportation Co., supra,* 405 F.2d 706, 713 (C.A. 2, 1969); *N.L.R.B. v. Cousins Associates,* 283 F.2d 242 (C.A. 2, 1960); *N.L.R.B. v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829. As soon as a third party demanded a reason for the discharge, Henry Accarino changed his explanation. See *Trey Packing, Inc. v. N.L.R.B.*, 405 F.2d 334, 338-39 (C.A. 2, 1969); *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 139 (C.A. 2, 1969), cert. denied, 394 U.S. 919. Apart from one instance, Accarino's *post hoc* explanation that Pieretti made too many mistakes lacks specificity, and it is unsupported by any testimony from Pieretti's foreman. *N.L.R.B. v. Dorn's Transportation Co., supra; Trey Packing Co. v. N.L.R.B., supra.* The sole established instance of unsatisfactory work by Pieretti took place almost two months before the discharge, and was the result of an improvident work assignment from Henry Accarino immediately after Local 455's recognition demand. See *N.L.R.B. v. Advanced Business Forms,* 474 F.2d 457, 465 (C.A. 2, 1973); *N.L.R.B. v. Montgomery Ward & Co., supra;* cf. *N.L.R.B. v. Mastro Plastics Co.*, 261 F.2d 147, 149 (C.A. 2, 1958). Accordingly, there is abundant evidence that the Company wished to be rid of Pieretti because of his Iron Workers activity, and that it seized upon – if it did not engineer – two minor incidents to provide a pretext for firing him.

C. The Discharge of Marcellas Vilcius

Marcellas Vilcius was discharged on June 5, after an incident wherein, contrary to his instructions, he distributed handles he had manufactured among boxes whose contents had been counted, making it necessary to recount an estimated 10,000 handles. The Company contends that he was discharged because Henry Accarino feared that Vilcius's inability to understand English or Spanish, underscored by this mistake, would lead to an accident. The Board reasonably found, however, that this was a pretext, and that the discharge was motivated by Vilcius' support for Local 455.

Vilcius had signed an Iron Workers' card on May 10. The facts supporting an inference that the Company knew the Union sympathies of the six laid off employees apply equally well to him, and his discharge occured two days after Local 455 filed an election petition with the Board (A. 120).

He was abruptly discharged, moreover, on account of a long standing condition. Vilcius had been hired by Henry Accarino in September 1973, at a time when he spoke only French (A. 205-06). Although no one in the plant could communicate with him except by gestures, he did his unskilled job well enough to receive two raises (A. 83-84, 184-85). Henry Accarino conceded that, despite the language problem, Vilcius had caused no accidents or damage and had made only the minor mistakes expected of any employee (A. 183, 186-87, 219). Accarino further conceded that when Vilcius was fired, his English was no worse, and perhaps better, than when he was hired (A. 219). In short, there is no evidence, as the Board observed, that "the language problem had grown more severe or had caused significant problems in [Vilcius's] performance of his duties" (A. 28).

Since there was no sudden change in Vilcius' ability to communicate that required his abrupt dismissal after 9 months of satisfactory service, it is permissible to consider other factors. These new factors include the presence of Local 455, Vilcius support of it, and the Company's manifest desire to break an organizing campaign that had already produced an asserted card majority and a petition for election. Under all the circumstances, the Board could fairly conclude that the Company seized upon the handle incident as an occasion to rid itself of another Iron Workers adherent. See *N.L.R.B. v. Advance Business Forms, Inc.*, 474 F.2d 457, 463-64 (C.A. 2, 1973); *N.L.R.B. v. Midtown Service Co.*, 425 F.2d 665, 670-71 (C.A. 2, 1970); *N.L.R.B. v. Piezo Corp.*, 290 F.2d 455, 456 (C.A. 2, 1961); *N.L.R.B. v. Montgomery Ward & Co.*, 242 F. 2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829.

III. THE CONFLICT BETWEEEN THE INTERESTS OF THE DISCRIMINATEES AND TEAMSTERS' LOCAL 840 MADE IT APPROPRIATE NOT TO DEFER TO ARBITRATION.

The collective bargaining agreement in effect between the Company and Local 840 provided for arbitration of grievances. In August 1974, William Nuchow, Local 840's business agent, grieved the two discharges and six layoffs that are the subject of this case. After a hearing on September 27, Arbitrator Joseph Wildebush entered an award that ruled the layoffs and Pieretti's discharge to have been in accordance with the contract (A. 17, 68). The award also noted that the Company had offered Vilcius reinstatement without backpay (A. 17-18; 68). The Board declined to defer to the arbitration proceeding. (A. 19).

It is well settled that although the Board may, in its discretion, defer to grievance arbitrations that involve alleged unfair labor practices, it retains the overriding statutory authority to decide the unfair labor practice

charges itself. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1963); *N.L.R.B. v. Horn & Hardart, Inc.*, 439 F.2d 674 (C.A. 2, 1971). See 29 U.S.C. § 160(a). It follows that the role of the reviewing court is to see that the Board's discretion is not abused. See *Ramsey v. N.L.R.B.*, 327 F.2d 784, 787-88 (C.A. 7, 1964), cert. denied, 377 U.S. 1063. And this Court has stated:

> [I]t is worth remembering that the Board's rules on deference, after all, are self imposed. . . . We do not suggest that the Board can announce a policy regarding deference to arbitration and then blithely ignore it, thereby leading astray litigants who depend on it. But it can change its mind or alter its standards for deference in some respects without necessarily engaging in conduct so blameworthy as to justify calling it an abuse of discretion.

N.L.R.B. v. Horn & Hardart, Inc., supra, at 679.

In *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955), the Board announced its basic policy that it would defer to grievance arbitration awards only if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision . . . is not clearly repugant to the purposes and policies of the Act." As a corrollary to the requirement of apparent fairness, the Board will not defer when it appears that the employees' interests are in conflict with both the union and the employer. *Kansas City Meat Packers,* 198 NLRB No. 2 (1972), 80 LRRM 1743; see *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB 461, 462, n. 4 (1972); cf. *International Harvester Co.*, 138 NLRB 923, 928 (1962). The Board will find an apparent conflict when, as in this case, the employees have supported an outside union that was opposed by both the employer and the incumbent union. *Suburban Transit Corp.*, 218 No. 185 (1974), 89 LRRM 1471.[22]

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[22] Those courts which have considered the *Kansas Meat Packers* doctrine have found it to be an appropriate use of the Board's discretion. As the Fifth Circuit has stated,

(continued)

The record in this case shows a clear appearance of conflict between Local 840 and the eight discriminatees. Local 840 was the incumbent union at the time the grievances were filed. Nuchow, its business agent, had actively opposed Local 455. He had, indeed, told Leroy Howard, that he could produce 100 men with baseball bats in case of trouble with another union, which the Board found to be a threat in violation of Section 8(b)(1)(A) of the Act (A. 46). The employees, on the other hand, had suffered at the Company's hands precisely because of their support for the outside union. It is difficult to see how, in this situation, Nuchow could be expected to adequately present their grievances. Cf. *Suburban Transit Corp., supra*, 218 NLRB No. 185 (1975), 89 LRRM 1471; *Local 2088, IBEW*, 218 NLRB No. 48 (1975), 89 LRRM 1590.

Nuchow's performance in the arbitration reinforces this conclusion. There is no evidence that any of the employees except Pieretti and Vilcius received notice of the September 27 hearing.[23] Nuchow never inquired of the President of Local 455, whom he knew, whether any of the men had signed Iron Workers' cards (A. 217). He was so unaware of the facts of Vilcius' case that he offered him a *Spanish* interpreter (A. 74). Only Vilcius was present at the hearing and he had no interpreter (A. 213, 218). Nuchow presented no evidence and made no attempt to produce witnesses except the last minute letters to the discharged employees (A. 217-18). He

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22 (continued) "it is especially desirable, if not required, that the Board make sure that the parties' rights are safeguarded by refusing to defer to arbitration in those cases in which the interests of the charging party are not in substantial harmony with the party expected to fairly and effectively process the grievance through arbitration proceedings." *N.L.R.B. v. Brotherhood of Railway, Airline & Steamship Clerks*, 498 F.2d 1105, 1110 (C.A. 5, 1974). Accord: *N.L.R.B. v. Int'l Longshoremen's & Warehousemen's Union*, 514 F.2d 481, 483 (C.A. 9, 1975); *T.I.M.E.-DC v. N.L.R.B.*, 504 F.2d 294, 303 (C.A. 5, 1974).

23 Nuchow mailed notices on September 24. Those addressed to Bailey, Escalera, Gonzales, and Pellott Reyes were returned unopened, p. 10, *supra*.

could not recall if he himself testified or if the arbitrator asked any questions about Local 455 (A. 216-17). The arbitrator's decision states that no evidence of activity for Local 455 was presented (A. 73).

It is thus evident that the employee's interests and Local 840's conflicted, and that the conflict could well have affected the adequacy of the arbitration. The Board was therefore well within the scope of its discretion in deciding to independently find the facts in this case. *N.L.R.B. v. Int'l Longshoremen's and Warehousemen's Union*, 514 F.2d 481, 483 (C.A. 9, 1975); *T.I.M.E.-DC v. N.L.R.B., supra*, 504 F.2d 294, 303 (C.A. 5, 1974); *N.L.R.B. v. Brotherhood of Railway, Airline & Steamship Clerks, supra*, 498 F.2d at 1110.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should enter a judgment enforcing the Board's order in full.

JOHN S. IRVING,
General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

PAUL J. SPIELBERG,
JAMES HIRSCHHORN,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

January, 1976.

SUPPLEMENTAL APPENDIX

Respondent's Exhibit No. 2A

May 30, 1974

Manuel Sanchez Agosto
2949 West 23rd Street
Brooklyn, New York 11224

Dear Mr. Agosto,

Please return to work Monday, June 3, 1974 at 7:30 A.M.

Very truly yours,

Henry J. Accarino
President
General Iron Corp.

HJA:sb
cc: Local 840, I.B.T.

S.A. 2

Respondent's Exhibit No. 6A

May 30, 1974

Luis Escalera
2836 West 23rd Street
Brooklyn, New York 11224

Dear Mr. Escalera,

Please return to work Monday, June 3, 1974 at 7:30 A.M.

Very truly yours,

Henry J. Accarino
President
General Iron Corp.

HJA:sb
cc: Local 840, I.B.T.

S.A. 3

Respondent's Exhibit No. 7A

June 4, 1974

Mr. Jose E. Carrion
2864 West 25th Street
Brooklyn, New York 11224

Dear Mr. Carrion,

Please return to work Thursday, June 6, 1974 at 7:30 A.M.

Very truly yours,

Henry J. Accarino
President
General Iron Corp.

HJA:sb
cc: Local 840, I.B.T.

S.A. 4

Respondent's Exhibit No. 8A

June 4, 1974

Mr. Enrique Pellot
2859 Stillwell Avenue
Brooklyn, New York 11224

Dear Mr. Pellot,

Please return to work Thursday, June 6, 1974 at 7:30 A.M.

Very truly yours,

Henry J. Accarino
President
General Iron Corp.

HJA:sb
cc: Local 840, I.B.T.

S.A. 5

Respondent's Exhibit No. 9A

June 4, 1974

Mr. Charles Bailey
705 Saratoga Avenue
Brooklyn, New York 11212

Dear Mr. Bailey,

Please return to work Thursday, June 6, 1974 at 7:30 A.M.

Very truly yours,

Henry J. Accarino
President
General Iron Corp.

HJA:sb
cc: Local 840, I.B.T.

S.A. 6

Respondent's Exhibit No. 10A

May 30, 1974

Carlos Gonzales
2954 West 29th Street
Brooklyn, New York 11224

Dear Mr. Gonzales,

Please return to work Monday, June 3, 1974 at 7:30 A.M.

Very truly yours,

Henry J. Accarino
President
General Iron Corp.

HJA:sb
cc: Local 840, I.B.T.

[EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS]

* * * *

192 LEROY HOWARD

called as a witness, having first been duly sworn by the Judge, testified upon his cath as follows:

* * * * *

206 Q. When he talked to you at the bench was anyone else present? A. No, not at the time.

Q. What did Mr. Nuchow say to you at that time? A. He say unions had tried to come down, you know, and when they had picket signs or something set up – I am not sure how he said it – and they tried to come down on him like this and he had brought a hundred men to chase them away.

Something like that.

Q. He said he had to use 100 men? A. He said he had bring 100 men and chased them away.

Q. Did he say anything else that you recall? A. Yes.

He said he bring down a hundred mens, what could I do about it, nothing I could do about it, something like that.

Q. Do you recall anything else he said? A. Not offhand.

Q. Do you recall if he said anything what these 100 men would have? A. Yes. Baseball bats.

207 He say they use 100 men with baseball bats, come down with baseball bats.

* * * * *

458 MARIO ACCARINO

called as a witness, first being duly sworn, was examined and testified as follows:

* * * * *

484 THE WITNESS: Jose Carrion.

Q. Jose –

JUDGE JALETTE: Carrion.

THE WITNESS: Yes. He was rehired on 8/13/74.

Q. Now, Mr. Accarino –

JUDGE JALETTE: Is he still there?

THE WITNESS: No.

JUDGE JALETTE: What happened?

THE WITNESS: Well, I got here he was fired.

JUDGE JALETTE: What date?

THE WITNESS: 9/20/74.

* * * * *